



## **H.R. 3867 - Small Business Contracting Program Improvements Act**

### **EXECUTIVE SUMMARY**

H.R. 3867 was introduced by Representative Nydia Velázquez (D-NY) and was ordered to be reported by a vote of 21 – 4 in the Small Business Committee on October 18, 2007. The bill is estimated to cost \$11 million in 2008 and \$72 million over the 2008-2012 period, subject to the availability of appropriated funds.

H.R. 3867 gives small businesses owned by service-disabled veterans new priority status in receiving sole source federal government contracts if the firm is otherwise qualified to provide the good or service at a reasonable price. Additionally, H.R. 3867 raises the limit on an individual's net worth that can qualify as being "economically disadvantaged" from \$250,000 to \$550,000.

The bill authorizes federal agency procurement officers to implement a program to give preference to women-owned businesses. This provision authorizes the procurement officers to make their own determinations on when women owned small businesses are under-represented in an industry and when to give them preference. Both the Republican staff at the Small Business Committee and the Bush Administration have concerns about this provision's "constitutionally suspect creation of gender-based set-asides."

The Republican staff at the Small Business Committee also have concerns that provisions in the bill will limit economic development in low income areas by making it more difficult for Historically Underutilized Business Zones (HUB Zones) to obtain sole source contracts, and that other provisions will "exacerbate an already complex federal procurement system."

### **FLOOR SITUATION**

H.R. 3867 is being considered on the floor under a structured rule. The Rule:

- Waives all points of order against consideration of the bill except those arising under clauses 9 (earmarks) and 10 (PAYGO) of Rule XXI.
- Provides one hour of general debate equally divided and controlled by the Chairman and Ranking Republican Member of the Small Business Committee.
- Provides that the bill shall be considered as read.

- Waives all points of order against provisions of the bill. This waiver does not affect the point of order available under clause 9 (earmarks) of rule XXI.
- Makes in order only those amendments printed in the Rules Committee report accompanying the resolution. (See Amendments Section Below)
- Provides that the amendments made in order may be offered only in the order printed in the report, may be offered only by a Member designated in the report, shall be considered as read, shall be debatable for the time specified in the report equally divided and controlled by the proponent and an opponent, shall not be subject to amendment, and shall not be subject to a demand for division of the question in the House or in the Committee of the Whole.
- Waives all points of order against the amendment printed in the report except for clauses 9 (earmarks) and 10 (PAYGO) of Rule XXI.
- Provides one motion to recommit with or without instructions.
- Provides that, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

This legislation was introduced by Representative Nydia Velázquez (D-NY) on October 17, 2007. The bill was ordered to be reported by a vote of 21 - 4, by the Committee on Small Business on October 18, 2007.

H.R. 3867 is expected to be considered on the floor of the House of Representatives on October 30, 2007.

## **SUMMARY**

### New Priority Status Given to Businesses Owned by Service-Disabled Veterans

H.R. 3867 mandates that any small business owned by service-disabled veterans shall receive a sole source federal government contract if the firm is otherwise qualified to provide the good or service at a reasonable price. This provision eliminates the process of competitive bidding for applicable government contracts in favor of awarding contracts to businesses owned by service-disabled veterans. Under current law, only economically and socially disadvantaged small businesses are authorized to receive sole source contracts, H.R. 3867 will extend this status to small businesses owned by service-disabled veterans as well.

*\*Note: Republican Small Business Committee Staff have concerns that H.R. 3867 provides both small businesses owned by economically and socially disadvantaged individuals, and small businesses owned by service-disabled veterans, with the same level*

*of priority in receiving sole source contracts without providing any guidance as to which type of small business is to be awarded a contract in which they are competing against one another.*

#### Elimination of Restricted Competition Preference for HUBZone Small Businesses

The bill eliminates the requirement that when evaluating competitive bids for an applicable government contract, that the contracting officers must restrict competition amongst bidders for government contracts and give preference to small businesses located in historically underutilized business zones (HUBZones), when two or more small businesses located in HUBZones are capable of performing the contract.

*\*Note: Republican Small Business Committee staff have concerns that this provision will make it significantly more difficult for HUBZone firms to obtain contracts and will thereby limit economic development in low income areas and “further enhance the government’s capacity to award contracts through a racially-based classification.”*

#### New Penalties for Falsely Impersonating a Service-Disabled Veteran Owned Business

The bill adds small businesses owned and controlled by service-disabled veterans to the list of small business types that an individual or organization may be penalized for fraudulently misrepresenting to the Small Business Administration (SBA) in order to get preferential contract authority treatment.

#### Codifying the President’s Order to Increase Contracting Opportunities for Disabled Veterans

H.R. 3867 codifies the language of President Bush’s [Executive Order 13360](#), which requires federal agencies to “strengthen opportunities in Federal contracting for service-disabled veteran businesses.” The bill fulfills the Executive Order by requiring the SBA to expand contracting opportunities for disabled veteran businesses and provide information and training to those businesses on federal contracting law, procedures, and practices.

#### New Requirement of Business Integrity Background Checks for Some Small Businesses

The bill requires the SBA to conduct background checks to ensure that the “applicant does not lack business integrity” for small business contract applicants that are designated as either HUBZone businesses or economically and socially disadvantaged status. The bill also requires random business integrity background checks on small businesses that have been awarded federal contracts.

*\*Note: Republican Small Business Committee staff have concerns that this provision excludes small businesses that are designated as being run by either service-disabled veterans or women from the business integrity background check requirement and that the provision “undermines the need for integrity in all of the programs.” Additionally, the Republican Committee staff have concerns that since current federal law already requires contracting officers to determine the business integrity of any federal contract recipient, this provision could lead to a situation where the SBA and the contracting officer do not agree on the integrity of a contract recipient and nothing in this provision*

*provides for the resolution of such a conflict. The Republican Committee staff feel that this ambiguity may “exacerbate an already complex federal procurement system.”*

#### Establishing Goals for Awarding Contracts to Disadvantaged Small Businesses

H.R. 3867 requires the President to annually establish government-wide goals for awarding contracts to small businesses that are owned and operated by service-disabled veterans, HUBZone small business concerns, socially and economically disadvantaged individuals, and women.

#### Priority Status for Disadvantaged Small Businesses in Subcontract Awards

The bill requires that recipients of large government contracts that subcontract the work they are performing for the federal government give priority status to small businesses that are owned and operated by service-disabled veterans, socially and economically disadvantaged individuals, women, and small businesses located in a HUBZone when awarding subcontracts.

#### Raising the Limits on the Size of Sole Source Contracts

H.R. 3867 raises the monetary threshold for how large a sole source contract for a qualified small business can be from \$3 million to \$5.1 million for most types of contracts, and the threshold for contracts for manufactured goods which is currently \$5.1 million is raised to \$5.5 million. Under H.R. 3867, the following types of small businesses will qualify for the increased monetary threshold for sole source contracts: those owned and operated by socially and economically disadvantaged individuals, a service-disabled veteran, or located in a HUBZone.

*\*Note: Currently only small businesses located in HUBZones qualify for sole source contracts, and the Republican staff at the Small Business Committee have concerns that this provision’s inclusion of small businesses owned and operated by socially and economically disadvantaged individuals or service-disabled veterans will “detract from the ability of HUBZone firms to obtain sole source awards.”*

#### Implementing the Women’s Procurement Program

The bill codifies current law by requiring the SBA to implement the “women’s procurement program.” The program limits the competition for competitive contracts by giving small businesses owned and operated by women a preferential status.

*\*Note: In 2004, the United States Women’s Chamber of Commerce filed a claim against the SBA for failing to implement the women’s procurement program, and the court ordered the SBA to implement the program.*

#### Authorizing Procurement Officers to Implement the Women’s Procurement Program

H.R. 3867 authorizes federal agency procurement officers to implement the women’s procurement program by making their own determinations on when women owned small businesses are under-represented in an industry and when to give them preference.

*\*Note: Republican Small Business Committee staff have concerns that this delegation of responsibility to agency procurement officers may create situations where different agencies may treat the same women-owned business(es) differently and thereby raise equal protection problems under the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution. The Bush Administration also stated that “it opposes the bill’s constitutionally suspect creation of gender-based set-asides.”*

#### Eligibility Investigations for 2<sup>nd</sup> Time HUBZone Contract Recipients

The bill requires that after any small business that is located in a HUBZone is granted a federal contract, if that small business is awarded a second federal contract, the SBA must investigate on site to ensure that the small business still meets the requirements for treatment as a HUBZone small business.

*\*Note: In 2005, a SBA Inspector General Report found that over 80% of qualified federal small business HUBZone contract recipients were found to be “unresponsive or otherwise unable to meet continued requirements for program participation” when they underwent reevaluation. Republican Small Business Committee staff have concerns that “the problem with this provision is that it does not solve the problem of a firm that has had on-site verification and subsequent to that verification is no longer eligible. This harms HUBZone firms that are eligible for the program by possibly denying them contracts which have been awarded to post-verification firms that have lost eligibility.”*

#### New Limits on Construction Contracts in HUBZones

H.R. 3867 establishes that a small business may not receive a federal construction contract through the HUBZone program unless “the construction project is located in or near the HUBZone in which the small business concern has its principal place of business.” Further, the bill requires the SBA to clearly prescribe standards for determining when a project is located ‘near’ a HUBZone, and establishes that the definition of ‘near’ must be less than 150 miles.

#### Contesting the SBA’s Decisions to Award HUBZone Contracts

The bill expands the list of the types of small businesses that may challenge the SBA’s decision(s) to award a HUBZone contract from only including other HUBZone program participants to now include all small businesses. This provision will allow non-HUBZone small businesses to contest the eligibility of a HUBZone small business to receive the contract.

#### Raising the Limit on Net Worth Requirements for “Economically Disadvantaged”

H.R. 3867 raises the limit on an individual’s net worth that can qualify as being “economically disadvantaged” from \$250,000 to \$550,000. The bill also codifies current law requiring that both an individual’s equity in a business and their equity in their primary personal residence are excluded from the calculation of net worth.

*\*Note: The Republican Small Business Committee staff are concerned that under the new standards in H.R. 3867, “the vast majority of Americans would be considered economically disadvantaged.”*

### Extending the Term of Sole Source Contracts for Disadvantaged Businesses

The bill extends the term of the program to provide sole source contracts to socially and economically disadvantaged small businesses from 9 years to 10 years, allowing those businesses one additional year in which to obtain sole source contracts. The bill also establishes that the first 6 years of the term shall be considered the developmental phase, and the last 4 years the transitional phase.

### Contesting the SBA's Decisions to Award Disadvantaged Small Business Contracts

H.R. 3867 establishes that any small businesses may challenge the SBA's decision to award a socially and economically disadvantaged small business contract. This provision will allow small businesses that bid for a federal contract and lose to a socially and economically disadvantaged small business to contest the eligibility of that socially and economically disadvantaged small business to receive the contract.

## **BACKGROUND**

### SBA's Definition of Socially and Economically Disadvantaged Individuals

According to SBA's definition of socially and economically disadvantaged individuals on the SBA [website](#), "under the Small Business Act, certain presumed groups include African Americans, Hispanic Americans, Asian Pacific Americans, Native Americans, and Subcontinent Asian Americans. Other individuals can be admitted to the program if they show through a "preponderance of the evidence" that they are disadvantaged because of race, ethnicity, gender, physical handicap, or residence in an environment isolated from the mainstream of American society. In order to meet the economic disadvantage test, all individuals must have a net worth of less than \*\$250,000, excluding the value of the business and personal residence.

"Successful applicants must also meet applicable size standards for small business concerns; be in business for at least two years; display reasonable success potential; and display good character. Although the two-year requirement may be waived, firms must continue to comply with various requirements while in the program."

*\*Note: H.R. 3867 increases the net worth limit from \$250,000 to \$550,000.*

### HUB Zones

According to the Congressional Research Service ([RL 33243](#)), the HUB Zone program encourages government agencies to award contracts to businesses located in areas that meet certain specific criteria concerning high unemployment rates or high housing costs as defined by the HUB Zone Act of 1997. The SBA's [website](#) states that in order to qualify as a HUB Zone an area must qualify as a "non-metropolitan county" as defined by the Internal Revenue Code, with a median household income of less than 80 percent of the State median household income or with an unemployment rate of not less than 140 percent of the statewide average, based on U.S. Department of Labor recent data; or be located within the boundaries of a federally recognized Indian reservation.

In order for a small business to qualify as a HUB Zone firm, it must be owned and controlled by one or more U.S. Citizens and at least 35% of its employees must reside in a HUB Zone. HUBZone firms can compete for government contracts limited to HUBZone firms and receive a 10% price adjustment in competitive contracts. In some circumstances, HUBZone firms can be awarded sole-source contracts.

## **AMENDMENTS**

*(The Amendment summaries below appear as they are printed on the Republican Rules Committee [website](#))*

**Representative Todd Akin (R-MO):** The amendment would require that the Administrator of the Small Business Administration (SBA) conduct a study to determine what changes would be required to provide greater Federal contracting assistance to participants in the program created by section 8(a) of the Small Business Act that have less equity in their business concerns than other participants in the program. The study would be reported no later than six months after the date of enactment of this Act and the Administrator would report the details of the study to the Senate Small Business Committee and the House Small Business Committee.

**Representative Brian Baird (D-WA):** The amendment would direct the Administrator of the Small Business Administration to examine the lists of groups the members of which are presumed to be socially disadvantaged under the Small Disadvantaged Business program under section 8(a) of the Small Business Act and to consider whether the list should be updated to include additional groups.

**Representative Ginny Brown-Waite (R-FL):** The amendment would create a liaison within the Small Business Administration whose duty, in consultation with the Assistant Secretary of the Department of Homeland Security for US Immigration and Customs Enforcement, is to ensure that section 2(i) of the Small Business Act, regarding assistance to individuals not lawfully within the United States is carried out.

*\*Note: Representative Ginny Brown-Waite's office noted that "Section 2(i) of the Small Business Act specifies that only those here lawfully shall receive funds under the Act."*

**Representative Kirsten Gillibrand (D-NY):** The amendment would prohibit awarding a contract to a business that has knowingly hired or continued to employ, an unauthorized alien.

**Representative Nick Lampson (D-TX):** The amendment would prohibit the use of any funds made available through any Small Business Administration program for first-class or business-class airline travel. The amendment would provide exceptions based on federal agency approval, lack of coach class seating, or need for business or first class to accommodate a disability.

**Representative John Mica (R-FL):** The amendment would clarify that the small business set-aside provisions of the Small Business Act (15 U.S.C. 644) should apply to federal contracts not excluding Federal Supply Schedule and Multiple Award Schedule holders.

**Representative John Mica (R-FL):** The amendment would state that it is the sense of the House that the Comptroller General should clarify the Small Business Act set-aside provisions as they apply to Federal Supply Schedule/Multiple Award Schedule of the GSA. The findings should be reported back to the House Small Business Committee and the House Oversight and Government Reform Committee.

**Representative James Moran (D-VA):** The amendment would require that the Administrator of the Small Business Administration conduct a study to determine, with respect to small business contracts, whether incumbent Federal contractors are submitting frivolous protests to extend the length of current contracts before protest decisions are resolved. The Administrator also would develop recommendations to discourage frivolous protests.

**Representative Nydia Velazquez (D-NY):** This amendment would establish that those veterans who are severely disabled shall be given special consideration as agencies implement contracting regulations. It would also set forth certain standards for business integrity that are required for participation in federal contracting programs. Additionally, the amendment would clarify the implementation of the women's procurement program. It would also provide that no contract can be awarded to a contractor known to have hired or recruited an alien known to be unauthorized.

**Representative Peter Welch (D-VT):** The amendment would require the Administrator of the Small Business Administration to carry out a study on the effectiveness of the HUBZone program in reaching rural areas.

## **COST**

The Congressional Budget Office (CBO) estimates that implementing H.R. 3867 would cost \$11 million in 2008 and \$72 million over the 2008-2012 period, subject to the availability of appropriated funds. CBO notes that enacting H.R. 3867 would increase civil penalties and thus could affect revenues, but CBO estimates that such effects would not be significant and that enacting the bill would not affect direct spending.

## **ADDITIONAL VIEWS**

Small Business Committee Ranking Member, Steve Chabot (R-OH) said at the mark up on H.R. 3867 that "although the bill helps America's veterans, the other provisions in the bill make it problematic and I cannot in good conscience support the bill."

The Statement of Administration Policy on H.R. 3867 states "The Administration strongly opposes H.R. 3867, which would modify the small business procurement



programs of the Small Business Administration. The Administration appreciates the intent of H.R. 3867 to improve these programs and reduce the potential for fraud and abuse. However, the Administration believes that a number of the bill's elements would be burdensome or undesirable. In addition, some provisions of the bill raise significant constitutional concerns.” ([Statement of Administration Policy on H.R. 3867](#))

**STAFF CONTACT**

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